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S269456

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. LILIA GARCIA-BROWER, as Labor Commissioner, etc.,
Plaintiff and Appellant,

v.

KOLLA'S INC.,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE NO. G057831

ANSWER BRIEF ON THE MERITS

HORVITZ & LEVY LLP
BRADLEY S. PAULEY (BAR NO. 187298)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
bpauley@horvitzlevy.com

HORVITZ & LEVY LLP
BETH J. JAY (BAR NO. 53820)
*CHRISTOPHER D. HU (BAR NO. 293052)
505 SANSOME STREET, SUITE 375
SAN FRANCISCO, CALIFORNIA 94111-3175
(415) 462-5600 • FAX: (844) 497-6592
bjay@horvitzlevy.com
chu@horvitzlevy.com

APPOINTED PRO BONO COUNSEL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 4

INTRODUCTION 10

STATEMENT OF THE CASE 11

A. The Legislature enacts Labor Code section 1102.5 to protect employees who disclose wrongdoing to public agencies. 11

B. The Legislature expands the statute to protect internal disclosures by private-sector employees, but continues to require disclosure of wrongdoing. 14

C. A bartender complains to her boss about unpaid wages, prompting him to fire and threaten her. 17

D. The trial court enters a default judgment based on Labor Code section 98.6, which protects complaints about unpaid wages. The court declines to enter judgment based on section 1102.5. 18

E. The Court of Appeal affirms in part, holding that complaints that reveal no new information are not disclosures under section 1102.5. 20

LEGAL ARGUMENT 21

I. "[D]isclosing information" under section 1102.5 does not include complaints about matters already known to the recipient. 21

A. Disclosure requires that something unknown be revealed. 21

B. The Labor Commissioner's arguments about statutory context are misplaced. 25

C. Other parts of the statute confirm disclosure's ordinary meaning. 30

II. The Labor Commissioner's alternative arguments fail to overcome the statute's plain language. 32

A. Legislative history does not equate reporting and disclosure in this context. 32

B. The Court of Appeal's holding aligns with prior case law. 35

C. Other whistleblower statutes that feature dissimilar language do not cast doubt on the Court of Appeal's holding. 39

III. The Labor Commissioner's public policy concerns are unfounded. 41

A. Section 98.6 already protects complaints about unpaid wages. 41

B. Section 1102.5 already protects employee whistleblowers in other ways. 43

C. Other laws protect employee complaints in the workplace. 46

CONCLUSION 48

CERTIFICATE OF WORD COUNT 49

TABLE OF AUTHORITIES

Page(s)

Cases

Caribbean Shippers Ass'n, Inc. v. Surface Transp. Bd. (D.C. Cir. 1998) 145 F.3d 1362 23

Collier v. Superior Court (1991) 228 Cal.App.3d 1117 48

Colores v. Board of Trustees (2003) 105 Cal.App.4th 1293 29

Conservatorship of Bryant (1996) 45 Cal.App.4th 117 42

Edgerly v. City of Oakland (2012) 211 Cal.App.4th 1191 .... 38, 39

Gardenhire v. Housing Authority (2000) 85 Cal.App.4th 236 .... 14, 28, 29, 35, 38

Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66 47

Hager v. County of Los Angeles (2014) 228 Cal.App.4th 1538 .... *passim*

Huffman v. Office of Personnel Management (Fed.Cir. 2001) 263 F.3d 1341 .... 23, 37

In re W.B. (2012) 55 Cal.4th 30 37

Jaramillo v. County of Orange (2011) 200 Cal.App.4th 811 35

Kasten v. Saint-Gobain Performance Plastics Corp. (2011) 563 U.S. 1 [131 S.Ct. 1325, 179 L.Ed.2d 379] 47

Kleffman v. Vonage Holdings Corp.
(2010) 49 Cal.4th 334 42

Lambert v. Ackerley
(9th Cir. 1999) 180 F.3d 997 (en banc) 47

Lawson v. PPG Architectural Finishes, Inc.
(2022) 12 Cal.5th 703 .... 10, 12, 23, 29, 43, 35

Mize-Kurzman v. Marin Community College Dist.
(2012) 202 Cal.App.4th 832 .... *passim*

Nasuti v. Merit Systems Protection Bd.
(Fed.Cir. 2013) 504 F.Appx. 894 23

National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward
(2020) 9 Cal.5th 488 27

Nejadian v. County of Los Angeles
(2019) 40 Cal.App.5th 703 26

Nosal-Tabor v. Sharp Chula Vista Medical Center
(2015) 239 Cal.App.4th 1224 46

Patten v. Grant Joint Union High School Dist.
(2005) 134 Cal.App.4th 1378 .... 29, 43

People v. Garcia
(1999) 20 Cal.4th 490 43

People v. Gonzalez
(2017) 2 Cal.5th 1138 34

People v. Superior Court (Sahlolbei)
(2017) 3 Cal.5th 230 38

Sandoval v. Qualcomm Incorporated
(2021) 12 Cal.5th 256 30

Schmidt v. U.S. Dept. of Veterans Affairs
(E.D.Wis. 2003) 218 F.R.D. 619 23

Smith v. LoanMe, Inc.
(2021) 11 Cal.5th 183 .... 21, 25

Tameny v. Atlantic Richfield Co.
(1980) 27 Cal.3d 167 .... 47, 48

Wasatch Property Management v. Degrate
(2005) 35 Cal.4th 1111 22

Statutes

5 U.S.C. § 2302(f)(1)(B) 17, 37

29 U.S.C. § 215(a)(3) 47

Education Code
§ 44112, subd. (e) 40
§ 87162, subd. (e) 40

Government Code
§ 8547.1 28
§ 8547.2, subd. (e) 40
§ 9149.32, subd. (c) 40
§ 12940, subd. (h) 46

Health and Safety Code, § 1278.5, subd. (b)(1)(A) 47

Labor Code
§ 98.6 .... *passim*
§ 98.6, subd. (a) 14, 42, 46
§ 244 15
§ 244, subd. (b) 14
§ 1019 15
§ 1019, subds. (a) & (b)(1)(D) 14
§ 1102.5 .... *passim*
§ 1102.5, subds. (a)–(c) 38
§ 1102.5, subds. (a) & (b) 14, 27, 39
§ 1102.5, subd. (b) .... *passim*
§ 1102.5, subd. (c) 46
§ 1102.5, subd. (e) .... *passim*
§ 6310, subd. (a)(1) 47

Military and Veterans Code, § 56, subd. (h)(1) 40

Miscellaneous

Assem. Amend. to Assem. Bill No. 263 (2013–2014 Reg. Sess.) Apr. 11, 2013 33

Assembly Bill No. 263 .... 14, 15, 33, 34

Assem. Com. on Judiciary, Analysis of Sen. Bill No. 666 (2013–2014 Reg. Sess.) as amended May 7, 2013) 31, 33

Assem. Com. on Judiciary, Analysis of Sen. Bill No. 777 (2003–2004 Reg. Sess.) as amended May 29, 2003 13

Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 263 (2013–2014 Reg. Sess.) as amended Apr. 11, 2013 33

Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2452 (1983–1984 Reg. Sess.) as introduced Jan. 24, 1984 12

Black's Law Dict. (11th ed. 2019) 22

Black's Law Dict.: Third Pocket Edition (2006) 22

CACI No. 4603 30

Compact Oxford English Dict. (1st ed. 1971) 22

Concise Oxford American Dict. (11th ed. 2006) 22

Directions for Use to CACI No. 4603 (2020) 30

Div. of Labor Standards Enforcement, Enrolled Bill Rep. on Assem. Bill No. 2452 (1983–1984 Reg. Sess.) Aug. 22, 1984 12

Legis. Counsel's Dig., Assem. Bill No. 263 (2013–2014 Reg. Sess.) 15, 34

Legis. Counsel's Dig., Sen. Bill No. 496 (2013–2014 Reg. Sess.) 15, 16, 38

Legis. Counsel's Dig., Sen. Bill No. 666 (2013–2014 Reg. Sess.) 15

Merriam-Webster <https://www.merriam-webster.com/dictionary/disclose> 22

Sen. Amend. to Sen. Bill No. 666 (2013–2014 Reg. Sess.) May 7, 2013 33

Senate Bill No. 496 (2013–2014 Reg. Sess.) 15, 16, 34

Senate Bill No. 666 (2013–2014 Reg. Sess.) 14, 15, 33

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 777 (2003–2004 Reg. Sess.) as introduced Feb. 21, 2003 .... 14, 38

Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 496 (2013–2014 Reg. Sess.) as amended Sept. 6, 2013) 15

Stats. 1984, ch. 1083, § 1 11

Stats. 2003, ch. 484
- § 1 .... 12, 13
- § 2 .... 13, 14
- § 4 13

Stats. 2013, ch. 577
- § 3 14
- § 4 14
- § 5 .... 15, 16
- § 5.5 16
- § 7 16

Stats. 2013, ch. 732
- § 1 34
- § 2 14
- § 4 14
- § 6 .... 15, 16
- § 6.5 16
- § 9 .... 16, 34

Stats. 2013, ch. 781
§ 4 .... 16, 39
§ 4.1 .... 15, 16, 39
§ 5 16

Stats. 2015, ch. 792, § 2 37

Stats. 2020, ch. 344, § 2 37

Webster's 3d New Internat. Dict. (1981) 22

Whistleblower Protection Enhancement Act of 2012, Pub.L. No. 112-199 (Nov. 27, 2012) 126 Stat. 1466 .... 17, 37

ANSWER BRIEF ON THE MERITS

INTRODUCTION

The facts here are simple. A bartender complained to her boss about unpaid wages. In response, he fired her and threatened to report her to immigration authorities.

The issue presented is not whether California law protects the bartender's complaint. It does. Contrary to the Labor Commissioner's suggestion that without the protection of the general whistleblower statute, an employee affected by such a violation would have no recourse, Labor Code section 98.6 specifically protects employees who complain about unpaid wages.[1] The lower courts agreed that the bartender's complaint is protected under that statute.

Instead, the issue is whether her complaint is *also* protected under section 1102.5, which "provides whistleblower protections to employees who disclose wrongdoing to authorities." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 709 (*Lawson*).) As relevant here, the statute requires proof that the employee was "disclosing information" about unlawful conduct. (§ 1102.5, subd. (b) (hereafter § 1102.5(b)).) This requirement of "disclos[ure]" reflects the statute's longstanding focus on protecting whistleblowers who reveal information to government and law enforcement agencies. Although the statute now includes certain disclosures that private-sector employees make within their own companies, it is not—and has never

[1] All undesignated statutory references are to the Labor Code.

been—a protection for ordinary workplace complaints, many of which are covered by other statutes like section 98.6. Section 1102.5 serves a different purpose: encouraging employees to put otherwise hidden information about lawbreaking into the hands of those who will address the violation once it is brought to light.

The Court of Appeal held that because section 1102.5(b) requires "disclos[ure]," it does not apply when, as here, the employee complains about unlawful conduct to someone who already knows about that conduct. Indeed, here the complaint was made to the very person alleged to be engaging in the unlawful conduct. The Court of Appeal was correct. When an employee makes a complaint to someone she knows (or should know) is already aware of the unlawful conduct, that complaint is not a disclosure, and it falls outside section 1102.5.

STATEMENT OF THE CASE

A. The Legislature enacts Labor Code section 1102.5 to protect employees who disclose wrongdoing to public agencies.

The Legislature enacted section 1102.5 in 1984. At that time, the statute's antiretaliation provision focused solely on disclosure to public agencies: "No employer shall retaliate against an employee *for disclosing information to a government or law enforcement agency*, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation." (Stats. 1984, ch. 1083, § 1, p. 3698, emphasis

added.) Thus, the statute did not protect internal disclosures by private-sector employees to their employers.

The Legislature instead sought to encourage the flow of information to public agencies that could act to investigate and correct such violations. (See Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2452 (1983–1984 Reg. Sess.) as introduced Jan. 24, 1984 [noting "a number of reported instances where employees have been fired or threatened for 'blowing the whistle' on illegal activities of their employer"]; Div. of Labor Standards Enforcement, Enrolled Bill Rep. on Assem. Bill No. 2452 (1983–1984 Reg. Sess.) Aug. 22, 1984 [proponents argued that "Any worker who wishes to disclose a possible violation of the law by his/her employer should, *in the interests of law and order*, have the right to do so without recrimination or retaliation in any form" (emphasis added)].)[2]

The statute remained unchanged for nearly two decades. In 2003, the Legislature amended section 1102.5 "in response to a series of high-profile corporate scandals and reports of illicit coverups," including widely publicized financial fraud at Enron and WorldCom. (*Lawson*, *supra*, 12 Cal.5th at p. 710.) Consistent with the statute's original purpose, these amendments sought to encourage "early detection of corporate wrongdoing." (Stats. 2003, ch. 484, § 1, p. 3517.) The idea was to expose wrongdoing before it could do significant harm to the public. Bill supporters highlighted the toll that financial fraud takes on

[2] The Labor Commissioner's motion for judicial notice includes copies of the bill reports and analyses cited in this brief.

" 'workers, pensioners, investors, and others,' " and hoped that expanding whistleblower protections "would give California an 'early warning system' " that might " 'preempt the devastation that comes with corporate fraud.' " (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 777 (2003–2004 Reg. Sess.) as amended May 29, 2003, p. 3.)

In crafting this later bill, the Legislature remained focused on disclosure to public agencies. Thus, among other things, the 2003 legislation created a whistleblower hotline at the Attorney General's office to field calls and make referrals to appropriate public agencies. (Stats. 2003, ch. 484, § 4, p. 3519.) The bill also included a legislative statement that "The employees of a corporation are in a unique position to report corporate wrongdoing to an appropriate government or law enforcement agency," and that employees should be encouraged to notify a public agency "when they have reason to believe their employer is violating laws enacted for the protection of corporate shareholders, investors, employees, and the general public." (Stats. 2003, ch. 484, § 1, pp. 3517–3518.) Aside from slight, nonsubstantive changes, section 1102.5(b) remained unchanged. It continued to apply only to "disclosing information to a government or law enforcement agency" (Stats. 2003, ch. 484, § 2, p. 3518), and did not protect disclosures private-sector employees might make within their companies or firms.

At the same time, the Legislature recognized that reports by *public* employees within their agencies may fall within the statute. The 2003 legislation added a new provision—section

1102.5, subdivision (e) (hereafter section 1102.5(e))—stating that "[a] report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b)." (Stats. 2003, ch. 484, § 2, p. 3518.) This provision codified *Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 242–243 (*Gardenhire*), which held that the statute protected a public employee who reported unlawful conduct within her own agency. (See Sen. Com. on Judiciary, Analysis of Sen. Bill No. 777 (2003–2004 Reg. Sess.) as introduced Feb. 21, 2003, p. 2.)

B. The Legislature expands the statute to protect internal disclosures by private-sector employees, but continues to require disclosure of wrongdoing.

In 2013, the Legislature enacted three bills that altered section 1102.5(b).

Two of those bills—Assembly Bill No. 263 and Senate Bill No. 666—focused on low-wage immigrant workers. These bills featured various provisions unrelated to section 1102.5. As relevant here, the Legislature amended section 98.6 to prohibit retaliation against employees who make written or oral complaints that they are owed unpaid wages. (Stats. 2013, ch. 577, § 3; Stats. 2013, ch. 732, § 2; see Lab. Code, § 98.6, subd. (a).) The Legislature also defined immigration-related threats as an adverse employment action. (Stats. 2013, ch. 577, § 4; see Lab. Code, § 244, subd. (b).) And it made threatening to contact immigration authorities illegal if done with retaliatory purpose. (Stats. 2013, ch. 732, § 4; see Lab. Code, § 1019,

subds. (a) & (b)(1)(D).) Each of these other forms of prohibited conduct applies in this case. The lower courts here found that the employer violated sections 98.6 and 244, and they did not question the Labor Commissioner's determination that the employer also violated section 1019. (CT 188–189; typed opn. 3, 18.)

By themselves, Assembly Bill No. 263 and Senate Bill No. 666 would not have altered section 1102.5's exclusive focus on disclosures to public agencies. (See Stats. 2013, ch. 577, § 5; Stats. 2013, ch. 732, § 6.) Their changes to section 1102.5 dealt with other issues.[3] Instead, it was a different bill—Senate Bill No. 496—that expanded protection to employees "disclosing information . . . to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance," thereby protecting for the first time internal disclosures by private-sector employees. (Stats. 2013, ch. 781, § 4.1; see Legis. Counsel's Dig., Sen. Bill No. 496 (2013–2014 Reg. Sess.).)

Unlike the other two bills, Senate Bill No. 496 did not focus on low-wage immigrant workers. It focused instead on the California Whistleblower Protection Act and related administrative procedures for state employees. (Sen. Rules Com.,

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[3] These bills amended section 1102.5(b) to protect employees who provide information to public bodies conducting hearings and investigations, and they expanded the class of persons prohibited from engaging in retaliation to include any person acting on the employer's behalf. (Legis. Counsel's Dig., Sen. Bill No. 666 (2013–2014 Reg. Sess.); Legis. Counsel's Dig., Assem. Bill No. 263 (2013–2014 Reg. Sess.).)

Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 496 (2013–2014 Reg. Sess.) as amended Sept. 6, 2013, p. 1.) A legislative report describes this bill's proposed amendments to section 1102.5(b) as "prudent changes to the corresponding anti-retaliation provisions of the Labor Code" to protect, among other things, "internal complaints," but does not identify any particular impetus for these changes. (*Id.* at pp. 4–5.)[4]

Eventually, the Legislature partially merged the three bills. (Stats. 2013, ch. 577, §§ 5, 5.5, 7; Stats. 2013, ch. 732, §§ 6, 6.5, 9; Stats. 2013, ch. 781, §§ 4, 4.1, 5.) But there is no sign that the Legislature's decision to expand section 1102.5(b) to protect internal disclosures by private-sector employees stemmed from a specific concern about low-wage immigrant workers, unlike its stated justifications for the other amendments described above. Without Senate Bill No. 496, section 1102.5 would have continued to apply only to disclosures made to public agencies. (See Stats. 2013, ch. 577, § 7; Stats. 2013, ch. 732, § 9.) And as discussed, it was the other two bills—not Senate Bill No. 496—that focused on immigrant workers.

Also notable is what the Legislature did *not* do in 2013. The year before, a published Court of Appeal decision held that

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[4] Senate Bill No. 496 also amended section 1102.5(b) to prohibit retaliation by an employer who "believes that the employee disclosed or may disclose information" to authorities, as well as to protect disclosures relating to violations of local law. (Legis. Counsel's Dig., Sen. Bill No. 496 (2013–2014 Reg. Sess.).) And it clarified that whistleblower protection applies regardless whether the employee makes the disclosure as part of his or her job duties. (Stats. 2013, ch. 781, §§ 4, 4.1.)

"the report of information that [is] already known d[oes] not constitute a protected disclosure" under section 1102.5(b), in part because the statutory term " 'disclos[e]' " requires revelation of something previously hidden. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858–859 (*Mize-Kurzman*).) Despite overhauling the statute in 2013, the Legislature took no action to abrogate or otherwise cast doubt on *Mize-Kurzman*, even though an analogous federal law had recently been amended to redefine "disclosure." (See 5 U.S.C. § 2302(f)(1)(B); Whistleblower Protection Enhancement Act of 2012, Pub.L. No. 112-199 (Nov. 27, 2012) 126 Stat. 1466.) Thus, as relevant here, section 1102.5 continues to require proof that the employee was "disclosing information" about unlawful conduct (§ 1102.5(b)) just as it has since its enactment in 1984.

C. A bartender complains to her boss about unpaid wages, prompting him to fire and threaten her.

The underlying events took place in early 2014, just after the 2013 amendments went into effect.

A.C.R. was a bartender at Kolla's Night Club in Orange County. (CT 35.)[5] She complained to Gonzalo Sanalla Estrada, the nightclub's owner, about unpaid wages for three shifts. (CT 35; see CT 147–148.) This complaint upset Estrada. (CT 35.) He threatened to report A.C.R. "to the 'immigration authorities,' "

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[5] Like the Labor Commissioner, we refer to A.C.R. by her initials. (See OBOM 6, fn. 2; typed opn. 2, fn. 4.)

fired her, and warned her never to return to the nightclub. (*Ibid.*)

A.C.R. filed a retaliation complaint with the Department of Labor Standards Enforcement (DLSE). (CT 147, 155–156.) The agency investigated A.C.R.'s complaint and confirmed her allegations. (CT 147, 159.) Estrada acknowledged that A.C.R. had complained about unpaid wages, but he disagreed about the amount she had been due. (CT 159.) In late 2015, the agency sent Estrada a letter summarizing its determination that Estrada—along with Kolla's, Inc., the company that operated the nightclub—had engaged in unlawful retaliation. (CT 158–161.) It ordered Kolla's and Estrada to take remedial measures. (CT 159–160.)

D. The trial court enters a default judgment based on Labor Code section 98.6, which protects complaints about unpaid wages. The court declines to enter judgment based on section 1102.5.

Kolla's and Estrada ignored the agency's determination letter. (CT 153.) The Labor Commissioner sued, asserting claims under both section 98.6 and section 1102.5. (CT 31.) The complaint focused on the section 98.6 claim. (CT 32–40.)

The section 1102.5 portion of the complaint contained few specific allegations. It quoted section 1102.5, then alleged on information and belief that A.C.R.'s "foregoing protected activity was a contributing factor" in the retaliation she suffered. (CT 40–41.) Elsewhere in the complaint, the Labor Commissioner alleged that A.C.R. had "a good faith, reasonable belief that

her . . . complaint disclosed a violation" of the law. (CT 35.) But the Labor Commissioner did not allege that Estrada had been unaware of the unpaid wages when A.C.R. complained about them.

Kolla's and Estrada failed to answer the complaint, and the Labor Commissioner sought a default judgment. (CT 69–70.) The trial court ultimately agreed to enter judgment on the section 98.6 claim after requiring the Labor Commissioner to prove up the defaulted claims. The court concluded that there was only one violation of section 98.6 rather than two because the termination and immigration threat "were essentially simultaneous, in a single conversation." (CT 183.) As for the section 1102.5 claim, the court determined that the Labor Commissioner failed to state a claim because the retaliation A.C.R. suffered "was a result of her having complained only *to her employer*," rather than to a government or law enforcement agency. (CT 181–182.)

The court entered judgment against Kolla's and Estrada, imposing a civil penalty for a single violation of section 98.6. (CT 194; typed opn. 5.)

E. The Court of Appeal affirms in part, holding that complaints that reveal no new information are not disclosures under section 1102.5.

The Labor Commissioner appealed, challenging the trial court's treatment of both claims. (Typed opn. 5–6.)[6]

The Court of Appeal confirmed that A.C.R.'s "conduct was protected by [section 98.6] because she was complaining about unpaid wages." (Typed opn. 18.) It unanimously agreed with the Labor Commissioner that Kolla's violated section 98.6 twice: first by terminating A.C.R. and then by threatening her with immigration consequences. And, the court decided, it was appropriate to impose liability for each. (Typed opn. 18–19.) As a result, the court reversed with instructions to double the civil penalties. (Typed opn. 19–20.)

As for the section 1102.5 claim, the Court of Appeal unanimously agreed that the trial court erred when it held that the statute only protects disclosures to a public agency. (Typed opn. 7–8; dis. typed opn. 1.) The majority concluded, however, that the trial court's error was harmless. It held that " 'disclosing' "—the key term in section 1102.5(b)—requires "the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made." (Typed opn. 10.) Here, however, the Labor Commissioner never alleged that Estrada—the person to whom A.C.R.

[6] The Court of Appeal later granted the Labor Commissioner's motion to dismiss the appeal as to Estrada. (Typed opn. 2, fn. 3; OBOM 13, fn. 6.) As a result, the Court of Appeal's disposition refers only to Kolla's.

complained—was unaware of her unpaid wages. (Typed opn. 11.) Nor was there any basis to infer that A.C.R.'s complaint was news to Estrada. He "had an obligation to ensure payment of wages," and he responded furiously when A.C.R. complained. (*Ibid.*) The majority found his actions "completely counter-intuitive if indeed he was unaware of her unpaid wages." (*Ibid.*)

Justice Fybel dissented from the majority's section 1102.5 holding, arguing that the statute protects complaints about unlawful conduct even if that conduct is already known to the complaint's recipient.

LEGAL ARGUMENT

I. "[D]isclosing information" under section 1102.5 does not include complaints about matters already known to the recipient.

A. Disclosure requires that something unknown be revealed.

Section 1102.5(b) protects employees from retaliation for "disclosing information" about unlawful activity. The Court of Appeal began its analysis with the word " 'disclosing' " (typed opn. 10), and the Labor Commissioner accepts this is the key statutory term (see OBOM 16–18). We agree.

When interpreting a statute, this Court looks to the text's plain meaning. (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190 (*Smith*).) If the statutory language is clear, its ordinary meaning typically controls. (*Ibid.*) "When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word."

(*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122.)

Disclosure has a settled meaning that governs its meaning within the statute. It means revealing something hidden or otherwise unknown. (See Merriam-Webster <https://www.merriam-webster.com/dictionary/disclose> [as of Mar. 18, 2022] ["to make known or public"; "to expose to view"]; Black's Law Dict. (11th ed. 2019) ["To make (something) known or public; to show (something) after a period of inaccessibility or of being unknown; to reveal"]; Black's Law Dict.: Third Pocket Edition (2006) p. 212 ["The act or process of making known something that was previously unknown; a revelation of facts"]; Concise Oxford American Dict. (11th ed. 2006) p. 255 ["make (secret or new information) known. . . . allow (something) to be seen, esp. by uncovering it"]; Compact Oxford English Dict. (1st ed. 1971) p. 417 ["To open up (that which is closed or shut); to unclose, unfold, to unfasten"].)

Given this definition, courts interpreting section 1102.5(b) have repeatedly recognized, as the Court of Appeal majority below explained, that "disclosing information" requires that new information be revealed. (Typed opn. 10 ["The word 'disclose' means 'to make known' or to 'open up to general knowledge,' especially 'to reveal in words (something that is secret or not generally known),' " quoting Webster's 3d New Internat. Dict. (1981) p. 645]; *Mize-Kurzman*, *supra*, 202 Cal.App.4th at p. 858 [applying same definition]; see *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1550 (*Hager*) ["we accept the

dictionary definition of 'disclosure' as used by the court in *Mize-Kurzman*"], disapproved on another ground in *Lawson*, *supra*, 12 Cal.5th at p. 718, fn. 2.)[7]

The Labor Commissioner claims that disclosure may include things that are not entirely new—as in drawing a curtain " 'to [disclose] *once again* the lobby.' " (OBOM 17, emphasis added.) Though unconventional, that sense of the word might work for visual perception: a physical object might be visible, then hidden from view, and then disclosed again. But for disclosing information—and especially information about unlawful conduct—it makes little sense to say that disclosure includes matters already known. Once a person knows about unlawful conduct, they do not just unlearn it; telling them something they already know is not a second disclosure.

The Labor Commissioner contends, in the alternative, that disclosure could include informing the recipient not just about the

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[7] Courts have applied the same definition when interpreting the words "disclose" and "disclosure" in other contexts. (See *Huffman v. Office of Personnel Management* (Fed.Cir. 2001) 263 F.3d 1341, 1349–1350 (*Huffman*) [based on dictionary definitions, "the term 'disclosure' [in the federal Whistleblower Protection Act] means to reveal something that was hidden and not known"], superseded by statute as stated in *Nasuti v. Merit Systems Protection Bd.* (Fed.Cir. 2013) 504 F.Appx. 894, 896; *Caribbean Shippers Ass'n, Inc. v. Surface Transp. Bd.* (D.C. Cir. 1998) 145 F.3d 1362, 1364 [plain meaning of "disclosure" did not include company's purely "internal use of information"]; *Schmidt v. U.S. Dept. of Veterans Affairs* (E.D.Wis. 2003) 218 F.R.D. 619, 630 ["The court will define the term 'disclose' to mean the placing into the view of another information which was previously unknown"].)

underlying conduct, "but also that the employee intends to challenge it." (OBOM 18.) This theory is outside the issue presented and lacks support in the record and the statute. The Labor Commissioner's complaint did not allege that A.C.R. told Estrada she intended to challenge his unlawful practices (by, for instance, contacting the DLSE). The complaint merely alleges that A.C.R. "complained . . . about unpaid wages," then suffered immediate retaliation. (CT 35.)

This theory also conflicts with the statutory text. "[D]isclosing information" under section 1102.5(b) refers to the underlying facts constituting the violation, not the employee's views about it or the remedies the employee might or might not pursue because of it. For disclosure of information to be protected activity, the employee must have "reasonable cause to believe that *the information discloses a violation* of" the law. (*Ibid.*, emphasis added.) In this context, "information" can only mean information about the underlying conduct. Communicating information about one's plans to challenge the conduct does not "disclose[ ] a violation of" the law—it is the employee's *response* to a purported violation.

In sum, if an employee conveys information that she knows—or should know—the recipient is already aware of, that is not a disclosure under the statute. That rule applies, for instance, if the employee conveys information already in the public domain. (See *Mize-Kurzman*, *supra*, 202 Cal.App.4th at p. 859 [trial court "did not err in instructing that reporting publicly known facts is not a disclosure"].) And it is also true

where, as here, the employee complains directly to someone she knows is the wrongdoer. That kind of internal complaint may be protected by other statutes—as it is here, under section 98.6—but it is not covered by section 1102.5. Had the Legislature intended a different result, it could have used a more general term, such as "reporting" or "communicating," but it chose "disclosing."

B. The Labor Commissioner's arguments about statutory context are misplaced.

The Labor Commissioner urges this Court to look beyond the ordinary meaning of "disclosing" to the rest of the statutory framework. (OBOM 18–19.) We agree that statutory terms must be understood in context (see *Smith*, *supra*, 11 Cal.5th at p. 190), but here that context bolsters the Court of Appeal's holding. Even if this Court decides that the word "disclosing" does not resolve the issue presented, the rest of the statutory scheme confirms why the Court of Appeal was correct.

The Labor Commissioner contends that the decision below "cannot be squared" with other parts of section 1102.5, particularly in "the context of disclosures to government and law enforcement agencies." (OBOM 18.) She suggests that under the Court of Appeal's holding, the statute would protect only the first person to disclose information to a public agency. (OBOM 18–19.)

This argument overlooks a safe harbor built into the statute that protects employees who reasonably—but incorrectly—believe their communication discloses new information. To benefit from whistleblower protection, the

employee need only have “reasonable cause to believe that the information discloses a violation” of the law. (§ 1102.5(b).) Thus, an employee is protected even if, unbeknownst to them, someone else has already disclosed the same information. The Court of Appeal’s holding is sensitive to this statutory language, and thus eschews any “first report” rule. (Typed opn. 10 [disclosure depends on “the revelation of something new, *or at least believed by the discloser to be new*” (emphasis added)], 16 [“We do not advocate for a first report rule”].) As a result, disclosures after the “first report” may be protected if the employee reasonably believes that the information has not yet been disclosed.

Contrary to the dissent’s suggestion (dis. typed opn. 8), the statute’s “discloses a violation” clause aligns with the plain meaning of “disclosing information” (§ 1102.5(b)). As the majority recognized, “reasonable cause to believe that the information discloses a violation” (*ibid.*) means that statutory protection turns in part on “the employee’s subjective belief about the information being disclosed” (typed opn. 10, fn. 8). The “discloses a violation” clause modifies the “disclosing information” clause to protect employees who reasonably, but wrongly, believe they are disclosing new information.[8]

[8] It also protects those who make a reasonable mistake about whether the underlying conduct is illegal. (See *Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [under section 1102.5(b), “the employee must show only that he or she *reasonably believed* that there was a violation of a statute, rule, or regulation”].)

The Court of Appeal did not establish a "first report" rule, and thus the Labor Commissioner cannot rely on *Hager*, *supra*, 228 Cal.App.4th 1538. (See OBOM 19, 26–27.) *Hager* rejected a "first report" rule, at least for public employees reporting within their own agency, but was careful to note that "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager*, at p. 1552.) Here, the Court of Appeal's holding is about "already known" information, an issue *Hager* left undecided.

If anything, *Hager*'s discussion of a related provision—section 1102.5(e)—highlights why "disclosing information" under subdivision (b) is limited to the revelation of new information. For public employees reporting within their own agencies, section 1102.5(e) supplies a special rule: "A *report* made by an employee of a government agency to their employer *is a disclosure* of information to a government or law enforcement agency pursuant to subdivisions (a) and (b)." (Emphasis added.) Subdivision (e)'s use of different terms—"[a] report" and "a disclosure"—shows the Legislature understands those terms to convey distinct concepts. (See *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 500 & fn. 7 [varying language within the same statute "suggests an intent to convey a different idea"].) Indeed, there is a basic difference between those two words: unlike disclosure, "[a] report does not

necessarily reveal something hidden or unknown." (*Hager*, *supra*, 228 Cal.App.4th at p. 1550.)

Section 1102.5(e) protects mere reporting, but only for internal reporting by public employees. The statute thus implies that in other settings—including internal reporting by private-sector employees—a report that conveys information already known to the recipient is *not* a protected disclosure. (See *Hager*, *supra*, 228 Cal.App.4th at p. 1550 [this textual distinction suggests that "a public employee must merely 'report' unlawful conduct, and other employees must 'disclose,' unlawful conduct"; if the Legislature did not intend that distinction, "it is up to the Legislature to resolve this issue, not this court"].)

It makes sense that the statute would provide broader protection for public employees. As the Court of Appeal explained, "government entities occupy positions of public trust," and public employees are uniquely situated to remedy unlawful conduct that could harm the public, even when their reports do not disclose new information. (Typed opn. 14–15.) Thus, the Legislature recognized in enacting a related statute that "public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business." (Gov. Code, § 8547.1.)

For public employees, internal reporting about matters of public interest is an inherent part of the job. Consider the facts of *Gardenhire*, *supra*, 85 Cal.App.4th 236. There, an employee of a public housing agency reported waste and self-dealing by other agency personnel. (*Id.* at pp. 238–240.) The persons to whom she

reported within the agency were "themselves public employees and charged with the protection of the public interest" (*id.* at p. 242), something that would not be true of a private employer. Similarly, in *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1312–1313, a state university employee reported internally about alleged misuse of public funds. Her reports were protected under section 1102.5 even though she was "simply doing her job when she uncovered the unauthorized use of state assets." (*Id.* at p. 1312.) Given that she was "employed by a governmental agency," "she had every reason to expect that [the university supervisor with whom she shared the information] would not sweep the information under the rug." (*Ibid.*; see *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1386 (*Patten*) ["disclosing the allegedly unauthorized use of public assets" is "a whistleblowing archetype"], disapproved on another ground in *Lawson*, *supra*, 12 Cal.5th at p. 718, fn. 2.)

Next, the Labor Commissioner asserts that under the majority's approach, an employee's disclosure to a public agency that her employer was stealing from customers would not be protected activity unless the agency was unaware that theft is illegal. (OBOM 19; see dis. typed opn. 7–8.) This hypothetical misinterprets the statute and the Court of Appeal's decision. As discussed, what matters is whether the employee reasonably believes he or she is disclosing information about conduct that violates the law. The Court of Appeal's holding does not, as the dissent fears, require "that the illegal nature of that wrongdoing [be] previously unknown." (Dis. typed. opn. 7.) In the dissent's

theft hypothetical, an employee's disclosure to a public agency would be protected so long as the employee reasonably believes the public agency is unaware that the employer is stealing from customers.

Finally, the Labor Commissioner discusses CACI No. 4603, a model jury instruction for whistleblower claims. (OBOM 19–20; see dis. typed opn. 4.) But model jury instructions are not an independent source of law; they seek to distill the law. This Court routinely disapproves jury instructions that get the law wrong. (E.g., *Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256, 282–283 [model instruction failed to adequately explain essential element].) In any event, CACI No. 4603 properly requires "disclosure," and its Directions for Use (2020) at pages 1305 and 1307 reference *Mize-Kurzman*, *supra*, 202 Cal.App.4th at p. 858.

C. Other parts of the statute confirm disclosure's ordinary meaning.

The Labor Commissioner's argument fails to contend with two other aspects of section 1102.5(b) that buttress the Court of Appeal's holding.

First, in the "disclosing information" clause, the list of recipients to whom the disclosure may be made includes a public agency or "a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance." (§ 1102.5(b).) By adding these "person[s] with authority" in the 2013 amendments, the Legislature essentially broadened the statute from government

and law enforcement agencies to those who play an analogous role within a private company or firm. These persons and entities have something in common: they are well placed to investigate and correct the problem once it is revealed.

By contrast, a person who already knows about the unlawful conduct is unlikely to correct it in response to an employee's complaint. As the Court of Appeal majority observed, the statutory "requirement that the recipient of the information have 'authority' to investigate the violation indicates it feels a protected 'disclosure' is made to someone in a position to fix the violation—not the person engaged in the wrongdoing." (Typed opn. 13, fn. 10; see typed opn. 15, quoting *Mize-Kurzman*, *supra*, 202 Cal.App.4th at p. 859.) A supervisor who is perpetrating the unlawful conduct—like Estrada in this case—is unlikely to change that conduct in response to a complaint by a subordinate. The facts here bear that out because he doubled down by firing A.C.R. and threatening to call immigration authorities.

Second, the statute protects employees "providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry," so long as the "the employee has reasonable cause to believe that the information discloses a violation of" the law. (§ 1102.5(b).) The Legislature added this provision in 2013 with a specific problem in mind: workers were afraid to testify at legislative hearings to "expose" and "shed light on" illegal conduct. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 666 (2013–2014 Reg. Sess.) as amended May 7, 2013, p. 7.) Thus, like the "disclosing information" clause,

the "providing information" clause promotes disclosure of information that would otherwise be hidden and whose revelation furthers enforcement of the law.

II. The Labor Commissioner's alternative arguments fail to overcome the statute's plain language.

A. Legislative history does not equate reporting and disclosure in this context.

The Labor Commissioner notes that imprecise language appears in legislative analyses and reports from 1984 and 2003, with the term "disclose" seemingly used interchangeably with other words. (OBOM 20–21.) In that period, however, the Legislature was not addressing the scope of protection for internal disclosures by private-sector employees. Before 2013, the statute only protected disclosures to public agencies, not to private employers. More importantly, the Legislature has consistently used "disclose" and its variations in the statute itself. Thus, the provisions at issue require "*disclosing* information" with "reasonable cause to believe that the information *discloses* a violation of" the law. (§ 1102.5(b), emphasis added.) For private-sector employees like A.C.R., the statute has never encompassed mere reporting, complaining, or communicating within the employee's company or organization.

The Labor Commissioner also points to section 1102.5(e). (OBOM 22.) Contrary to her assertion, adding subdivision (e) did not make "report" equivalent to "disclose" for all purposes under the statute. Instead, as already discussed, the Legislature specified that a report counts as a disclosure for a particular

scenario: "[a] report made by an employee of a government agency to their employer." (§ 1102.5(e).) Subdivision (e) left in place the disclosure requirement for private-sector employees contacting public agencies, as well as for public employees making a disclosure outside their own agency. This divergent treatment only supports the Court of Appeal's holding.

Next, the Labor Commissioner quotes comments related to the 2013 amendments, which used phrases like " '*report* concerns,' " " '*demand[ ]*,' " and " '*spoken up*.' " (OBOM 23.) The cited references to "demanding" compliance with labor laws and protecting employees who have "spoken up" pertain to early versions of Senate Bill No. 666 and Assembly Bill No. 263, which focused on low-wage immigrant workers. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 666 (2013–2014 Reg. Sess.) as amended May 7, 2013, p. 4; Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 263 (2013–2014 Reg. Sess.) as amended Apr. 11, 2013, p. 8.)

At the time these legislative analyses were drafted, Senate Bill No. 666 and Assembly Bill No. 263 would not have expanded the "disclosing information" clause of section 1102.5(b) to include internal disclosures by private-sector employees. (See Sen. Amend. to Sen. Bill No. 666 (2013–2014 Reg. Sess.) May 7, 2013; Assem. Amend. to Assem. Bill No. 263 (2013–2014 Reg. Sess.) Apr. 11, 2013.) The quoted statements address other parts of the proposed legislation, such as amendments to prohibit immigration-related threats. Comments about *other* proposed

enactments do not inform the meaning of "disclosing information" under section 1102.5(b).

When the Legislature later enacted Assembly Bill No. 263, it included an uncodified preamble that refers to "workers be[ing] able to report concerns to their employers." (Stats. 2013, ch. 732, § 1.) Understood in context, however, the statement about "report[ing] concerns" (*ibid.*) refers to the immigrant-focused provisions first proposed in Assembly Bill No. 263, not the "disclosing information" clause of section 1102.5(b). The Legislative Counsel's Digest does not mention any change to the "disclosing information" clause. (Legis. Counsel's Dig., Assem. Bill No. 263 (2013–2014 Reg. Sess.).) That makes sense because, by itself, the bill would have left that clause untouched. (See Stats. 2013, ch. 732, § 9 [amendment to the "disclosing information" clause was dependent on enactment of Senate Bill No. 496].)

Moreover, a general statement about reporting concerns—appended to a broader bill that amended several statutes—does not tell us whether a complaint like A.C.R.'s qualifies as "disclosing information" under section 1102.5(b). The best indication of legislative intent remains the plain language of the statute itself, which requires disclosure. (See *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1146 [though uncodified statute was entitled to consideration, "it is only an aid" and "cannot be used to contradict the actual words used by the Legislature" in the codified section at issue].)

B. The Court of Appeal's holding aligns with prior case law.

The Labor Commissioner's brief features a standalone argument about past Court of Appeal decisions. (OBOM 24–29.) These decisions are relevant to the issue presented only if their reasoning is instructive or if the Legislature intended to adopt it. That the Court of Appeal might have chosen one side of a purported conflict does not mean it was wrong on the merits. In any event, there is no relevant conflict in the law.

In *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 826, the employer did not dispute that the employee's complaint was a "disclosure" under the statute's plain language. Had the employer mounted such an argument, it would have failed for reasons that do not apply to private-sector employees like A.C.R. *Jaramillo* involved an internal complaint by a public employee, so revelation of new information was not required—a mere "report" was sufficient. (See *id.* at p. 826 [discussing *Gardenhire*, *supra*, 85 Cal.App.4th 236, which section 1102.5(e) codified].) *Jaramillo* speculated that a complaint to the wrongdoer might prompt him to correct his behavior, but also recognized that the wrongdoer "may be the last person who might be willing to do anything about it." (*Jaramillo*, at p. 827; see *id.* at p. 829.)

Hager also involved an internal report by a public employee, and it expressly relied on section 1102.5(e). (*Hager*, *supra*, 228 Cal.App.4th at p. 1550.) Contrary to the Labor Commissioner's suggestion, *Hager* did not "reject[ ] *Mize-Kurzman*'s dictionary definition of 'disclosure.' " (OBOM 26.)

Rather, *Hager* "accept[ed] the dictionary definition of 'disclosure' as used by the court in *Mize-Kurzman*" but explained why that definition did not apply to an internal report by a public employee. (*Hager*, at p. 1550.)

Hager separately rejected the employer's argument that section 1102.5 includes a "first report" rule. (*Hager*, *supra*, 228 Cal.App.4th at pp. 1550–1552.) But as already discussed, *Hager* distinguished such a rule from the one the Court of Appeal properly applied here, which involves " 'already known' information." (*Id.* at p. 1552.) And while *Hager* noted the statute's "broad purpose" (*ibid.*), there the statute's purpose tracked the plain language of subdivision (e). *Hager* does not suggest that the overall purpose of the statute could override its plain language when a private-sector employee makes an internal complaint to someone she knows, or should know, is already aware of the wrongdoing.

The Labor Commissioner criticizes *Mize-Kurzman*, *supra*, 202 Cal.App.4th 832, because *Mize-Kurzman* cited federal precedent that has since been superseded by amendments to the federal whistleblower statute. (OBOM 27.) To begin with, *Mize-Kurzman*'s holding about "what constitutes disclosure protected by California law" flowed from what the court called the "ordinary sense" of the word disclosure. (*Mize-Kurzman,* at pp. 858–859.) *Mize-Kurzman* looked to federal cases for guidance, but the plain meaning of " 'disclosing' " and " 'discloses' " as used in section 1102.5(b) was an independent basis for its decision. (*Mize-Kurzman*, at p. 859.)

Furthermore, any comparison to federal law exposes a flaw in the Labor Commissioner's argument. Congress amended the federal Whistleblower Protection Act in 2012 to include within its definition of "disclosure" situations in which "the disclosure revealed information that had been previously disclosed." (5 U.S.C. § 2302(f)(1)(B); see Whistleblower Protection Enhancement Act of 2012, Pub.L. No. 112-199 (Nov. 27, 2012) 126 Stat. 1466; OBOM 27.) Congress thereby abrogated the federal cases that *Mize-Kurzman* cited, including *Huffman*, *supra*, 263 F.3d 1341, and essentially adopted the definition the Labor Commissioner urges here.

Unlike Congress, however, our Legislature has not adopted such a definition. The Legislature revamped section 1102.5 in 2013, shortly after *Mize-Kurzman* was decided and after Congress amended the federal Whistleblower Protection Act. Yet the Legislature took no action in response to *Mize-Kurzman*'s interpretation of disclosure or the then-recent federal legislation. (See *In re W.B.* (2012) 55 Cal.4th 30, 57 ["the Legislature is presumed to know about existing case law when it enacts or amends a statute"].) Nor has the Legislature changed the meaning of "disclosing information" in the years since, despite twice amending the statute in other ways. (See Stats. 2015, ch. 792, § 2; Stats. 2020, ch. 344, § 2.)

Although legislative inaction is not always informative, here the Legislature's apparent acquiescence in the then-existing California precedent is hard to ignore. If *Mize-Kurzman* was not enough to get the Legislature's attention, *Hager* remarked in

2014 that *Mize-Kurzman* may have "highlighted an inconsistency in the statute"—its divergent treatment of public employees and private-sector employees based on a distinction between the words "disclosure" and "report." (*Hager*, *supra*, 228 Cal.App.4th at p. 1550.) Yet as the Court of Appeal observed here, "the Legislature has chosen not to resolve the 'inconsistency' that [the *Hager*] opinion identified." (Typed opn. 16.)

Not only is the Legislature *presumed* to be aware of existing case law, the Legislature has in fact amended section 1102.5 in response to Court of Appeal decisions. As discussed, it enacted section 1102.5(e) with the express purpose of codifying *Gardenhire*, *supra*, 85 Cal.App.4th 236. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 777 (2003–2004 Reg. Sess.) as introduced Feb. 21, 2003, p. 2.) Another decision appears to have spurred one of the 2013 amendments. *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1200–1205, held that section 1102.5 does not apply to violations of local law. According to *Edgerly*, that was "a question of first impression." (*Id.* at p. 1202.) The next year, as part of the 2013 amendments, the Legislature expanded section 1102.5 to cover local rules and regulations. (Legis. Counsel's Dig., Sen. Bill No. 496 (2013–2014 Reg. Sess.); see § 1102.5, subds. (a)–(c).) Although the Legislature did not specify its intent to abrogate *Edgerly*, the Legislature is presumed to have " 'amended statutes " ' "in the light of such decisions as have a direct bearing upon them." ' " ' " (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 236.)

In addition, the Legislature appears to have codified a different aspect of *Mize-Kurzman*: its holding that activity otherwise protected under the statute does not lose protection just because the disclosure is made as part of the employee's job duties. (See *Mize-Kurzman*, *supra*, 202 Cal.App.4th at pp. 856–858; Stats. 2013, ch. 781, §§ 4, 4.1 [amending section 1102.5, subdivisions (a) and (b), to add that these subdivisions apply "regardless of whether disclosing the information is part of the employee's job duties"].) The Legislature did not explain its specific intent to codify this part of *Mize-Kurzman*, but as with *Edgerly*, the timing is unlikely to be coincidental. Despite these other amendments to section 1102.5, and unlike Congress's change to the federal statute, the Legislature has taken no action to expand "disclosing information" to include information about unlawful conduct already known to the recipient.

Finally, the Labor Commissioner claims that some cases have used "report" and "disclose" interchangeably. (OBOM 23–24.) But these cases do not address whether a mere "report" by a private-sector employee within his or her company is protected under section 1102.5. There is no reason to think the Legislature incorporated such a rule into the statute based on cases that failed to address the issue.

C. Other whistleblower statutes that feature dissimilar language do not cast doubt on the Court of Appeal's holding.

The Labor Commissioner notes that some California whistleblower statutes define a " 'protected disclosure' " in part

by using the word " '*communication.*' " (OBOM 23.) The cited statutes, though, do not protect all reports and communications, nor do they suggest reporting and communicating are synonymous with disclosure. Instead, these statutes expressly define what *kinds* of communications count as protected disclosures. (Gov. Code, § 8547.2, subd. (e) [disclosures by state employees]; Ed. Code, §§ 44112, subd. (e) [disclosures by elementary and secondary school employees], 87162, subd. (e) [disclosures by community college employees].) Other whistleblower statutes do the same. (Gov. Code, § 9149.32, subd. (c) [Legislative Employee Whistleblower Protection Act]; Mil. & Vet. Code, § 56, subd. (h)(1) [California Military Whistleblower Protection Act].)

Unlike these other whistleblower statutes, "No particular definition of 'disclosing information' or 'disclosure of information' is provided in Labor Code section 1102.5." (*Mize-Kurzman*, *supra*, 202 Cal.App.4th at p. 848.) Instead, the statute explains disclosure through a variation on the same term, requiring that the employee have "reasonable cause to believe that the information discloses a violation of" the law. (§ 1102.5(b).) The Legislature's decision not to define "disclosing"—except through emphasis on the same term—is precisely why this Court should look to the word's ordinary meaning.

Even if these other statutes were relevant, they support the Court of Appeal's decision. *Mize-Kurzman* noted the divergent language in Labor Code section 1102.5(b) and Education Code section 87162, subdivision (e), but held that because both statutes

require " 'disclosure,' " neither statute protects reports about publicly known facts. (*Mize-Kurzman*, *supra*, 202 Cal.App.4th at pp. 858–859.) If a statute requires disclosure, as this one does, that term should be given its usual meaning.

III. The Labor Commissioner's public policy concerns are unfounded.

A. Section 98.6 already protects complaints about unpaid wages.

The Labor Commissioner asserts that the Court of Appeal's approach would leave employees "unprotected." (OBOM 30.) She claims that under the Court of Appeal's decision, "many workers will be forced to risk irremediable retaliation if they complain to their employers about unpaid wages," and suggests that this concern is "particularly acute for immigrant workers." (OBOM 30–31.)

As this case shows, however, another statute already fulfills this role. The Labor Commissioner's complaint focused on section 98.6, and she prevailed on that claim—persuading the Court of Appeal that Kolla's violated section 98.6 not once but twice. Indeed, the Labor Commissioner previously characterized this as "a case of first impression regarding what constitutes a 'violation' of Labor Code section 98.6 for civil penalty purposes," explaining that "Section 98.6's civil penalty provision is a critical component of the Labor Commissioner's antiretaliation enforcement efforts." (8/29/19 Application for Extension of Time to File Appellant's Opening Brief 2.)

Under section 98.6, subdivision (a), an employer cannot retaliate against an employee "because the employee . . . made a written or oral complaint that he or she is owed unpaid wages." (§ 98.6, subd. (a).) Unlike section 1102.5(b), this provision applies to any "complaint" about unpaid wages; it does not limit relief to those "disclosing information." Section 98.6 thus protects employees like A.C.R. who complain directly to the wrongdoer about unpaid wages. There is no need to parse its language, which is direct and to the point.

There is no public policy reason to read section 1102.5(b) to cover the same conduct section 98.6 already addresses. On the contrary, it is doubtful that the Legislature—which enacted the relevant part of section 98.6 at the same time it was amending section 1102.5 to apply to private employers—intended the statutes to do the same work. (See *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 345 ["we must avoid interpretations [of statutes] that would render related provisions unnecessary or redundant"]; *Conservatorship of Bryant* (1996) 45 Cal.App.4th 117, 122 [that provisions of two statutes "were enacted at the same time, by the same bill," and addressed same topic "require[d] that the two provisions be interpreted coherently"].)

The Court of Appeal here had it right: "Section 98.6 provides exactly [the] relief" the Labor Commissioner seeks, and "[t]he very existence of a separate retaliation statute related to complaints about unpaid wages bolsters our interpretation of section 1102.5." (Typed opn. 18, fn. 13.) Section 98.6 squarely addresses A.C.R.'s complaint about wages, and legislative history

suggests her complaint is exactly what lawmakers had in mind when they amended that statute. By contrast, section 1102.5 is a general whistleblower statute that aims to prevent harm to the public. It should not be read to convert everyday workplace disputes into whistleblower cases where they do not otherwise qualify as such. (See *Patten*, *supra*, 134 Cal.App.4th at p. 1385 [reasoning in a related context that the statute does not protect complaints "arising from the routine workings and communications of the job site"].) Under the Labor Commissioner's expansive view of section 1102.5, every wage dispute could be turned into a whistleblower case even though section 98.6 already protects complaints about unpaid wages. The Legislature could not have intended that result when it amended both statutes in 2013.

B. Section 1102.5 already protects employee whistleblowers in other ways.

The Labor Commissioner suggests that the Court of Appeal's approach to section 1102.5 is so restrictive it will thwart the statute's purpose. (OBOM 29–31.) We agree that the statute " 'reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation.' " (*Lawson*, *supra*, 12 Cal.5th at p. 709.) But courts still must look at every statutory interpretation dispute in light of the language the Legislature selected. (Cf. *People v. Garcia* (1999) 20 Cal.4th 490, 501 [in the context of the Three Strikes law, "purpose is not a mantra that the prosecution can invoke in any Three Strikes case to compel the court to construe

the statute so as to impose the longest possible sentence"].) Section 1102.5(b) already protects employees across a wide range of settings, and the Legislature has amended it multiple times to expand its reach. There is no basis to create a public policy exception to the statute's disclosure requirement.

This case is a good illustration. Had this complaint been pled differently, or had the underlying facts been slightly different, the Labor Commissioner might have prevailed under section 1102.5.

It may be that Estrada retaliated against A.C.R. because he *believed* she might make a disclosure to the DLSE or another public agency—even though she had not yet done so. If so, his conduct would violate the statute. An employer cannot retaliate "because the employer *believes* that the employee disclosed *or may disclose information*, to a government or law enforcement agency." (§ 1102.5(b), emphasis added.) But the Labor Commissioner never asserted this anticipatory retaliation theory, relying instead on the allegation that A.C.R.'s complaint to Estrada was itself a protected disclosure.

Alternatively, had Estrada been unaware of the unpaid wages—or if A.C.R. had reason to believe he was unaware—A.C.R.'s complaint would have been a protected disclosure. (See typed opn. 11.) Yet the Labor Commissioner did not assert such

a theory, perhaps because the DLSE's investigation revealed Estrada knew about the unpaid wages.[9] (See CT 159.)

More generally, despite the Labor Commissioner's fears that the Court of Appeal's holding will "discourage workers from reporting wrongdoing at all" (OBOM 31), section 1102.5 already protects other disclosures about unlawful conduct. For instance, had A.C.R. disclosed information about her unpaid wages to the DLSE *before* approaching Estrada, that would be a classic form of protected activity: "disclosing information . . . to a government or law enforcement agency." (§ 1102.5(b).) Alternatively, had A.C.R. talked to the DLSE as part of an investigation into the nightclub's labor practices, that would be "providing information to . . . a[ ] public body conducting an investigation." (*Ibid.*)

And in a different, larger company, an employee who fears talking to her direct supervisor—including if the supervisor is the wrongdoer—can make a protected disclosure to "another employee who has the authority to investigate, discover, or correct the violation or noncompliance." (§ 1102.5(b).) That person could be a compliance officer, human resources professional, or high-level manager, among others. (See *Lawson*, *supra*, 12 Cal.5th at p. 708 [whistleblower complained to wrongdoer, but also "filed two anonymous complaints with [employer's] central ethics hotline," which "led to an investigation"].)

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9 The dissenting justice in the Court of Appeal argued that the majority drew an improper inference about Estrada's awareness. (Dis. typed opn. 20–21.) That argument is beyond the issue presented, and the Labor Commissioner does not defend it.

Furthermore, section 1102.5, subdivision (c), protects employees who "refuse[ ] to participate in an activity that would result in a violation" of the law. (See *Nosal-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1238–1241 [nurse refused to participate in unlawful testing procedure].) In some cases, employees who complain directly to the wrongdoer will be protected under subdivision (c), even if the complaint itself is not a protected disclosure under subdivision (b). Subdivision (c) does not apply here, but as discussed, section 98.6 already protects A.C.R.'s complaint, and subdivision (c) further demonstrates the care the Legislature has taken to address and protect particular forms of conduct.

C. Other laws protect employee complaints in the workplace.

The Labor Commissioner's public policy arguments presume that Labor Code section 1102.5 is the only state law protecting employee complaints. But it is far from alone. To name just a few examples, section 98.6, subdivision (a), is not limited to complaints about unpaid wages. That statute also protects complaints lodged with the Labor Commissioner, actions and notices filed under the Private Attorneys General Act, and more, broadly, "the exercise by the employee . . . on behalf of himself, herself, or others of *any rights* afforded him or her." (§ 98.6, subd. (a), emphasis added.) The Fair Employment and Housing Act forbids retaliation "because the person has opposed any practices forbidden under" that statute. (Gov. Code, § 12940, subd. (h).) And other California statutes protect employee

whistleblowers in contexts that do not require disclosure of new information—such as making an oral or written complaint to one's employer about workplace health and safety concerns (Lab. Code, § 6310, subd. (a)(1)), or presenting a grievance, complaint, or report to a health care facility (Health & Saf. Code, § 1278.5, subd. (b)(1)(A)).

The Labor Commissioner also overlooks federal law. In the wage and hour context, for example, the federal Fair Labor Standards Act protects internal complaints like the one A.C.R. made to Estrada. Its antiretaliation provision covers "any complaint" without requiring disclosure of information. (29 U.S.C. § 215(a)(3); see *Kasten v. Saint-Gobain Performance Plastics Corp.* (2011) 563 U.S. 1, 17 [131 S.Ct. 1325, 179 L.Ed.2d 379] [this provision encompasses oral complaints]; *Lambert v. Ackerley* (9th Cir. 1999) 180 F.3d 997, 1004 (en banc) [same provision protects internal complaints within a company].) Other federal laws protect whistleblowers in different settings.

Finally, the Labor Commissioner ignores the prospect that an internal complaint not protected by section 1102.5 could give rise to a claim under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, for unlawful termination in violation of public policy. Courts have long held that such claims may be viable even if the employee's conduct falls outside section 1102.5. (See *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [private-sector employee's internal complaint of unlawful behavior could be basis for *Tameny* claim based on "broad public policy interest in encouraging workplace whistle-blowers" though not covered by

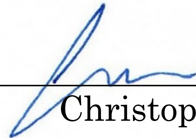
section 1102.5 at the time]; *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1123–1124 [same where private-sector employee reported to his employer illegal activity by fellow employees].) Like the panoply of other statutory protections for whistleblowers, the relative flexibility of common-law *Tameny* claims only highlights why there is no basis to read section 1102.5(b) contrary to its ordinary meaning.

CONCLUSION

For all these reasons, the Court should affirm the Court of Appeal's decision.

April 11, 2022

HORVITZ & LEVY LLP
BETH J. JAY
BRADLEY S. PAULEY
CHRISTOPHER D. HU



By: ______________________________
Christopher D. Hu

APPOINTED PRO BONO COUNSEL

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Christopher D. Hu

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Case No. S269456

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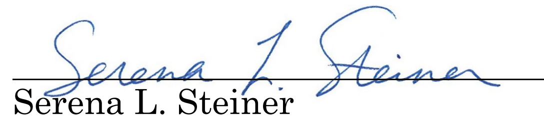

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Garcia-Brower v. Kolla's Inc.
Case No. S269456

Individual / Counsel	**Party Represented**
Nicholas Patrick Seitz State of California Department of Industrial Relations Division of Labor Standards Enforcement 464 W. 4th Street, Suite 348 San Bernardino, CA 92401 Phone: (909) 521-3853 • FAX: (415) 703-4807 Email: nseitz@dir.ca.gov	Plaintiff and Appellant **LILIA GARCIA-BROWER** *(Via TrueFiling)*
Kolla's Inc. c/o Gonzalo Sanalla Estrada 23716 Marlin CV Laguna Niguel, CA 92677	Defendant and Respondent **IN PRO PER** *(Via Overnight Mail)*
Clerk Fourth District Court of Appeal Division Three 601 West Santa Ana Boulevard Santa Ana, CA 92701	Case No. G057831 *(Via TrueFiling)*
Clerk, Orange County Superior Court - Main Hon. Martha K. Gooding, Dept. C31 Central Justice Center 700 Civic Center Drive Santa Ana, CA 92701 (657) 622-5231	Trial Court Judge Case No. 30-2017-00950004 *(Via U.S. Mail)*

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Last Name, First Name (PNum)

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